No. 12,115

IN THE

United States Court of Appeals

For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and GENERAL ENGINEERING AND DRYDOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and HENRY MANEKE and MOLLIE MANEKE, Parents of Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

FRANK J. HENNESSY,
United States Attorney,
DANIEL C. DEASY,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee Pillsbury.

WARD E. BOOTE,
Chief Counsel,
HERBERT P. MILLER,
Assistant Chief Counsel,
Bureau of Employees' Compensation,
Federal Security Agency,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Other Authorities

No. 12,115

IN THE

United States Court of Appeals

For the Ninth Circuit

INDUSTRIAL INDEMNITY EXCHANGE and GENERAL ENGINEERING AND DRYDOCK CORPORATION,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District of the Bureau of Employees' Compensation, Federal Security Agency, and HENRY MANEKE and MOLLIE MANEKE, Parents of Adrian Maneke, Deceased,

Appellees.

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE DEPUTY COMMISSIONER PILLSBURY.

STATEMENT OF CASE.

This is an appeal from a decree of the United States District Court for the Northern District of California, Southern Division, Honorable Michael J. Roche, District Judge, confirming a compensation order of the deputy commissioner filed on February 19, 1948, in

which he awarded compensation to Henry and Mollie Maneke, as dependent father and mother, respectively, of Adrian Maneke, who sustained fatal injuries on June 26, 1947, while he was employed as a painter by the General Engineering and Dry Dock Corporation at Alameda, California. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. sec. 901 *et seq.* The compensation liability of the employer was insured by the Industrial Indemnity Exchange.

The claim for compensation was controverted by the employer and carrier and a hearing was duly held before Deputy Commissioner Brown on October 21, 1947. The testimony taken at said hearing is printed in the Transcript of Record and will be referred to later.

FACTS.

The deputy commissioner in the compensation order complained of, found the facts with reference to the employee's fatal injuries and his parents' dependency to be in part as follows:

> "That on the 26th day of June, 1947, Adrian Maneke, son of the claimants above mentioned, was in the employ of the employer above named at Alameda, in the State of California, in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Worker's Compensation Act, and that the liability of the employer for compensation under said Act

was insured by Industrial Indemnity Exchange; that on said day the said employee while performing services for the employer as a painter and engaged in ship servicing operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in his immediate death as follows: While on a painting float at the after end of the ship he was thrown by a sudden movement of a wheel into the water and was drowned; that the average weekly wages of the claimant herein at the time of his injury amounted to the sum of $61.60; that claimants herein, Henry Maneke, born February 26th, 1891, and Mollie Maneke, born March 10th, 1894, are the father and mother of the said employee and were dependent upon him to a substantial extent for support at the time of his death; that they are entitled to a death benefit at the rate of 25 per cent of the statutory average weekly wages of the employee, amounting to $9.38 a week each beginning with June 26th, 1944 (*1947*) during their dependency or until the further order of the Deputy Commissioner."

The employer and carrier instituted a proceeding for judicial review of the compensation order pursuant to section 21 (b) of the Longshoremen's Act (33 U.S.C.A. sec. 921 (b)) alleging in substance that said order was not in accordance with law.

The court below by judgment on July 6, 1948, sustained the award of the deputy commissioner and it is from said judgment that this appeal is taken.

ARGUMENT.

THE FINDING OF THE DEPUTY COMMISSIONER AS TO THE DEPENDENCY OF THE PARENTS IS SUPPORTED BY EVIDENCE.

Before referring to the evidence, which in our opinion supports the finding complained of, it may not be inappropriate to invite attention to the following well-established principles of compensation law:

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042, 1932); *Associated General Contractors of America, Inc. et al. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934); cert. den. October 8, 1934, 293 U.S. 581

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *United Employees Casualty Co. v. Summerous,* 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (Wash. 1931); *Gulf Oil Corporation v. McManigal,* 49 F. Supp. 75 (W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South*

Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner, 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U.S. 528 (1932); 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Marshall, deputy commissioner v. Pletz,* 317 U.S. 383 (1943); *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469 (1947).

Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence should be taken as established facts and are not judicially reviewable: *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Ins. Co., v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Corporation v. Brown, deputy commissioner,* 56 F. (2d) 200 (Mich. 1929); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner, et al.,* 21 F. Supp. 535 (Me. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (N. Y. 1938); *Simmons v. Marshall, deputy commissioner,* 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C.C.A. 9, 1945).

The findings of fact of the deputy commissioner are presumed to be correct: *Anderson v. Hoage, dep-*

uty commissioner, 63 App. D.C. 169, 70 F. (2d) 773 (1934); *Luckenbach Steamship Co. Inc. v. Norton, deputy commissioner,* 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner,* 141 F. (2d) 964 (C.C.A. 5, 1944).

It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and such official may believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability: *Wilson & Co., Inc. v. Locke, deputy commissioner,* 50 F. (2d) 81 (C.C.A. 2, 1931); *Naida v. Russell Mining Co.,* 159 Pa. Super. 135, 48 A. (2d) 16 (1946); *Griffin's Case,* 315 Mass. 71, 51 N.E. (2d) 768 (1944); *Pittsburgh Plate Glass Co. v. Morgeson,* 177 P. (2d) 115 (Okla. 1947); *Lockheed Aircraft v. Industrial Accident Commission,* 28 Cal. (2d) 756, 172 P. (2d) 1 (1946); *Square De. Co. v. O'Neal,* 66 N.E. (2d) 898 (Ind. App. 1946).

In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation"; *Avignone Freres, Inc., et al. v. Cardillo, deputy commissioner, et al.,* 73 App. D.C. 149, 117 F. (2d) 385 (1940).

Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *C. F. Lytle Co. v. Whipple, deputy commissioner,* 156 F. (2d) 155 (C.C.A. 9, 1946); *Contractors, PNAB v. Pillsbury, deputy commissioner,* 150 F. (2d) 310 (C. C.A. 9, 1945); *South Chicago Coal & Dock Co., et al.*

v. Bassett, deputy commissioner, 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, et al. v. Central R. Co. of New Jersey,* 113 F. (2d) 413 (C. C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935).

The following is a reference to so much of the testimony taken at the hearing before the deputy commissioner on October 21, 1947, as is considered sufficient to show that the above mentioned finding of fact of the deputy commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

Henry Maneke testified at the hearing before the deputy commissioner on October 21, 1947, that his address was R.F.D. 1, Lebanon, Missouri; that he is the father of the deceased Adrian Maneke and has lived in Lebanon about three years; that he is about 56 years of age; that he had a nervous breakdown in 1944 and that he had farmed practically all of his life; that the deceased made his home with him but worked at Kansas City and afterwards in California, and that he was drowned on June 26, 1947; that in June 1946, deceased was working in Kansas City (Transcript 31); that he worked for the Ford Motor Company there, and later for General Motors, and

afterward for some other concern which manufactured gears, until about 1947 when he went to California; that during this period from June 1946 to January 1947 he had worked steady and would come home about every two weeks for the week-end (T. 32); that while he was in California he helped them financially in making alterations and repairs to the home; that this was a few weeks before he was drowned; that in July or August in 1946 he contributed towards the repairing and alterations of the barn to the extent of about $265.00 (T. 33); that he (the witness) owns the place upon which he lives having bought it about three years ago, with money he received from the sale of another farm in Marios County; that he had no other funds (T. 34); that while the deceased worked in Kansas City he would come home about every two weeks and give him money; that before he went to California deceased gave him enough money to last him for a while and to fix the buildings; that deceased gave him $40 or $50 when he left in addition to what he spent on the buildings; that the $40 or $50 was to take care of small bills for things which they needed around the house, including the installation of a kitchen cabinet which was purchased from Sears-Roebuck Company (T. 35, 36); that after going to California deceased sent him $50 sometime in February or March (T. 38); *that the contributions in cash since June 1946 amounted to $275 for alterations on the barn and about $165 for repairs, etc., to the house, together with the $50 contribution he sent after going to California* (T. 39);

that this was in addition to the money he contributed when he came home week-ends from Kansas City; that these contributions on his visits home averaged to $40 or $50 a month over a period of about six months; that deceased also paid a $25.00 doctor bill for the witness (T. 40); that at present he has six Jersey cows and a few chickens but there is not much income from his farm; that he sells cream and eggs but by the time he pays for feed and other expenses there is hardly any income left (T. 42); *that he expected the deceased to contribute to his support* (T. 44); that the deceased told him he could expect a part of his pay check (T. 45); that the purpose of those contributions from the deceased was to improve the farm for his parents to have a place to live and the contributions were also to help his parents when they needed money to live on (T. 46); that his other son Clarence was married and he had to take care of himself; that he (the witness) is not employed and has not worked much since 1946, when he quit sometime around the end of the year, but that even then he only worked now and then, probably two or three days a week, and then laid off a week or two; that altogether since June 1946 he has earned about $800 in a year (T. 48, 49).

Clarence Maneke testified at the same hearing that he was a brother of Adrian, the deceased, 29 years of age and that he has been married since 1944; that the deceased was discharged from the Army on January 4, 1946; *that the deceased had made out a dependency allotment in the Army;* that he stayed

around the house for two or three months and then went to Kansas City where he got a job with the Ford Motor Company with a salary of about $50 a week net (T. 51); that when he came home from Kansas City usually on Friday nights he gave his parents an average of about *$50 a month;* that he (the witness) was living in Mexico, Missouri, and the deceased would often pick him up and bring him home on his way; that each time he (the witness) was home he saw his brother give his mother money; that he visited home about once a month when the deceased would pick him up and drive him home; that his brother planned to give his mother an average of $50 a month for the parents' subsistence, for food, groceries and other necessities; that these contributions amounting to about $50 a month were in addition to those contributions testified to by his father (for the repair of the house and barn) (T. 52, 53); that one matter about which his father was mistaken in his testimony was concerning the electric sweeper; that this electric sweeper was purchased at Montgomery Ward Company last winter, a little more than a year ago for $50 and was paid for by his brother's check which he saw drawn (T. 54); that he has in his possession a letter written to him from his brother requesting that he advise his brother if his folks were in need of anything and that if necessary he would come home immediately (T. 57, 58); that his brother had a bank account with the State Bank of Lebanon, Missouri, showing a balance of about $1700 at the time of his death, and he also owned a Mercury au-

tomobile which had a ceiling price at the time of his death of about $850 (T. 62, 63).

The son Clarence further testified as follows:

"Q. You have heard your father's testimony here with reference to the arrangements that he had with your brother Adrian about this farm, and that you had something fixed up between the two of you as to what you were to get, if anything, out of the farm. Could you tell us anything about that?

"A. Well, the only thing I could say about that, of course the farm isn't worth a great deal and the folks have got to live quite a while, I hope, and I says 'Adrian', I says, 'I am married, I have got a family to look after', says, 'If you will take care of the folks, why' I says, 'as far as I am concerned, anything that is left in the estate, what is in it is yours.' He says, 'Well, I don't care nothing about that', says 'I will contribute the money to the folks and you stay there and take care of them any other way you can help them out while I am out working', he says, 'You will probably be around home more often than I am, if there is any sickness. As far as the farm is concerned or anything like that, when that time comes we will take care of that, we will—'

"Q. You had no definite arrangements?

"A. Well, that is what Daddy said he would do for us and as far as I was concerned, and Adrian, he was a good-hearted kid and he just didn't want to kinda hear of having it that way. When the time comes we will settle that. Now, that is what he told me, he says 'We will worry about that when the time comes' ". (T. 70, 71.)

Mollie Maneke testified that she lives in Lebanon, Missouri, R.F.D. 1, and was the mother of the deceased, Adrian Maneke (T. 63); that she was born 1894 (T. 69); that the deceased would return home from Kansas City about every two weeks and *turn over his pay check to her, and would tell her to take it and get what she needed out of it;* that she would take the checks to the bank and cash them and would keep the money she needed; that the remainder of it she deposited in the State Bank in the deceased's name (T. 64); *that she would keep for her need about $20 or on an average of $10 per week; that she did this regularly as long as the deceased worked in Kansas City;* that he turned over his check to her every time he came home which was every two weeks; that this continued during the six months he worked in Kansas City (T. 65); that the money which was given by the deceased for improvement on the place and the repair of the barn was given mostly at one time; that this money was given to his father, whereas the other checks were given to her, the witness; that she actually saw it given to the father (T. 66); that deceased also helped to install the cabinets and sink in the kitchen which cost about a hundred dollars (T. 67); that she could not say what the entire amount was that her son gave or sent to her during the 12 months before his death; that he just brought the money in and said: "Mama, here's some money, if you need it just use it", and she would take it and use it; that she also had authority to draw checks on his account; that she bought a refrigerator in the

previous fall, which the deceased had desired her to get all that summer and for which the deceased told her to write a check on his account; that her son Clarence got it for her and paid for it but that she reimbursed him by drawing a check for $250 on the deceased's account (T. 68, 69); that the income from the farm amounts to practically nothing; that after deducting feed bills and grocery bills there is nothing left (T. 69).

It is respectfully submitted that the testimony referred to above supports the deputy commissioner's finding that the mother and father were dependent upon this deceased employee.

The deputy commissioner's findings of fact in questions of dependency are final and conclusive when supported in evidence: *Jules C. L'Hote v. Crowell, deputy commissioner,* 286 U.S. 528 (1932). (Accord: *Texas Employers' Ins. Assoc. v. Sheppard, deputy commissioner,* 62 F. (2d) 122 (C.A. 5, 1932); *Harris v. Hoage, deputy commissioner,* 66 F. (2d) 801 (App. D.C. 1933); *Ottenstein v. Britton, deputy commissioner,* 160 F. (2d) 253 (C.A. D.C. 1947). In the *L'Hote* case *supra* the Supreme Court in a *per curiam* opinion reversed the United States circuit court of appeals for the fifth circuit in a case where the district court and the circuit court of appeals had failed to give *conclusive effect* to a finding of the deputy commissioner in a case involving a question of dependency, where there was evidence to support the finding.

The decisions under the Longshoremen's Act, to the effect that the question whether the parent of a minor child was dependent upon him is one of fact, are consistent with the decisions under other like compensation laws. This accord may be noted by comparison with the following cases: *Sallee v. Calhoun,* 46 N. M. 468, 131 P. (2d) 276 (1943); *Moorer v. Putnam Lumber Co.,* 152 Fla. 520, 12 S. (2d) 370 (1943); *Wilkin v. Shein's Express Co.,* 131 N.J.L. 450, 37 A. (2d) 47 (1944); *Crossett Lumber Co. v. Johnson,* 187 S.W. (2d) 161 (Ark. 1945); *Froman v. Banquet Barbecue,* 284 Mich. 44, 278 N.W. 758 (1938); *Garbutt v. Stoll,* 287 Mich. 393, 283 N.W. 624 (1939); *Batelho v. J. H. Tredenwick,* 64 R. I. 326, 12 A. (2d) 282 (1940); *Guidry v. Swift & Co.,* 199 S. 619 (La. App. 1941); *Smith v. Roth Cadillac Co.,* 145 Pa. Super. 292, 21 A. (2d) 127 (1941); *Crane Co. v. Industrial Comm.,* 378 Ill. 190, 37 N.E. (2d) 819 (1941).

Under the Longshoremen's Act it is not necessary to establish total or complete dependency, nor does the Act provide that the dependency shall be to a *substantial extent.* A showing of *partial* dependency satisfies the statute. See *Leon A. Harris, t/a L. A. Harris Company v. Hoage, deputy commissioner,* 66 F. (2d) 801 (App. D.C. 1933); *Pocahontas Fuel Company, Inc. v. Monahan, deputy commissioner,* 41 F. (2d) 48 (C.A. 1, 1930); *Michigan Transit Corp. v. Brown, deputy commissioner,* 56 F. (2d) 200 (D.C. Mich. 1929); *Texas Employers' Insurance Association v. Sheppeard, deputy commissioner,* 62 F. (2d) 122 (C.A. 5, 1932); *London Guarantee and Accident Com-*

pany, Ltd. v. Hoage, deputy commissioner, 75 F. (2d) 236 (C.A. D.C. 1934); *Wende v. McManigal, deputy commissioner,* 135 F. (2d) 151 (C.A. 2, 1943); *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, deputy commissioner,* 154 F. (2d) 560 (C.A. 4, 1946); *Ottenstein v. Britton, deputy commissioner,* 160 F. (2d) 253 (C.A. D.C. 1947).

See also the following additional compensation cases wherein an award was affirmed, involving questions of dependency (nearly all as partial dependency cases) arising out of contributions of deceased sons to the support of their parents and other relatives: *Paul v. State Ind. Accident Com.,* 272 P. 267 (Ore. 1920); *Pusher v. American Ry. Exp. Co.,* 183 N.W. 839 (Miss. 1921); *Associated Employers' Reciprocal Ass'n. v. Lawrence,* 264 S.W. 1038 (Tex. 1924); *State Engineering Co. v. Harris,* 146 A. 392 (Md. 1929); *Scuddy Coal Company v. York,* 26 S.W. (2d) 34 (Ky. 1930); *Clingan v. Carthage Ice & Cold Storage Co.,* 25 S.W. (2d) 1084 (Mo. 1930); *Ogden City v. Industrial Commission of Utah,* 193 P. 857 (Utah 1920); *Bylow v. St. Regis Paper Co.,* 166 N. Y. Supp. 874 (N. Y. 1917); *Kostemo v. H. G. Christman Co.,* 214 Mich. 652, 183 N.W. 902; *In re Peters,* 116 N.E. 848 (Ind. 1917); *Littell v. Lagomarsino Grape Company,* 17 N.W. (2d) 120 (Iowa 1945); *Arthur Murray Co. v. Cole,* 189 S.W. (2d) 614 (Ark. 1945); *Harvey v. Rocklin Mfg. Co.,* 24 N.W. (2d) 402 (Iowa 1946).

In *London Guarantee and Accident Company, Ltd. v. Robert J. Hoage, deputy commissioner,* supra, 75

F. (2d) 236, *which arose under the Longshoremen's Act* as applied in the District of Columbia and where it was held that the mother of a deceased employee was dependent upon him, *notwithstanding that the employee's father at the time of the son's death was regularly employed and was receiving wages in the amount of $77 a week.* The court in this case said:

> "The family kept no records of the housekeeping disbursements, but the father and mother estimated the expenses of maintaining the family at approximately $4,000 a year. All of this, apparently, was paid out of a fund handled by the mother and recruited from time to time by the wages, in whole or in part, of the father and the two sons.
>
> * * * * * * *
>
> "We do not mean to be understood as intimating that the *mere possession of the bare necessities of life is sufficient to take one out of the role of dependency* where other circumstances bring that condition into operation, nor to confine our definition of dependents to those persons who are not able to support life without assistance, *for if in fact they depend on such assistance as a part of their means of living, and help from others is necessary to sustain them in the position to which they are accustomed to live, they would, as we think, be properly classed as dependents under the statute.*
>
> * * * * * * *
>
> "The case of the mother presents a somewhat different problem. She had neither property nor income and was wholly dependent on others for her maintenance, and, while it is true her hus-

band owed her the duty of support and had the means to discharge it, the evidence liberally construed in favor of her claim, as we think it should be, may be said to show that she relied *on and received from her son regularly monthly sums of money, which she used and required in part for her support.* That she lived better and more comfortably as the result of the son's contribution does not destroy her claim of partial dependency. It is enough if she depended and relied on what he gave to enable her to enjoy the ordinary and reasonable necessities of life suitable to a person in her position. This, as we think, the evidence shows." (Emphasis supplied.)

In *Texas Employers' Ins. Assn. v. Sheppeard, deputy commissioner, supra,* in the fifth circuit, the court stated:

"Within the meaning of the act the father and stepmother of the deceased may have been partially dependent on him, though his contributions were not necessary to enable them to be supported without the help of another or others. The fact that much of the larger part of the money used in the support of the family was supplied by the father was not inconsistent with the father and stepmother being partial dependents of the deceased *if the contributions the latter was in the habit of making were required to enable them to meet the reasonably necessary expenses of living* in a way to which they were accustomed, and they looked forward to and relied on the continuance of such contributions for their support." (Emphasis supplied.)

See also *Michigan Transit Corp. v. Brown, deputy commissioner, supra,* wherein the court states:

> "Dependency has been generally held not to mean absolute dependency for the necessities of life, but rather that applicant *looked to and relied upon the contributions of the injured employee in whole or in part* as a means of supporting and maintaining himself or herself in accordance with the accustomed mode of life." (Emphasis supplied.)

In the recent case of *Wende, et al. v. McManigal, deputy commissioner, supra,* in the second circuit, the court said:

> "Parents are dependent if their own resources are not sufficient to support them, even if they receive help from their other children. To be sure, the parents were not dependent in the sense that they would have been destitute without decedent's financial assistance. But that is not the test; *the test is whether his contribution was in whole or in part a means of maintaining them in the manner in which they had been living and whether they looked forward to and relied upon the continuance of decedent's contributions to that end.*" (Emphasis supplied.)

In *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, deputy commissioner, supra,* in the fourth circuit, the court said:

> "These findings were based on testimony of the mother to the effect that she used the full amount of the money paid to her by her deceased son in the home and in paying bills for food and other household expenses, and that while she kept no

accounts she felt after his death the lack of the money which he had paid to her in his lifetime and realized that she did not have as much to spend for the family as she had had prior to his death. The appellant contends that since the mother did not furnish any figures to show the amount spent by her for food in the household, or to show that the weekly payments of $15 by the son exceeded the cost of the meals and other expenses entailed by reason of the presence of himself and his wife in the family circle, therefore there was no substantial evidence to support the finding of dependency. We do not think that this argument is tenable. There was enough in the record to support the conclusion of the Deputy Commissioner that the expense of housing and feeding the family of five, including the son and his wife, was more easily borne with the weekly payment of $15 included in the family budget than it was after the payment ceased and the son and his wife no longer were members of the family. That indeed was the substance of the mother's testimony; and it does not appear that the general household expenses, other than food, were substantially greater because of the presence of the son and his wife in the family group.

"The appellant suggests that after the son's death the mother could have more than made up the loss of income derived from him by furnishing room and board to an outside couple at more than $15 per week. We do not understand that dependency, as a term as used in the statute, is to be determined on such a basis. The statute expressly provides, 33 U.S.C.A. App. sec. 909 (f), that all questions of dependency shall be deter-

mined as of the time of the injury; and it is generally held under compensation acts that the right of a parent to death benefits does not turn upon the ability of the parent to support life after the death of the child, but *recovery is allowed where the parent depended, at least in part, for the maintenance of his accustomed standard of living upon the contributions of the deceased. London Guarantee & Accident Co. v. Hoage,* App. D.C. 75 F. (2d) 236; *Engineering Co. v. Harris,* 157 Md. 487; *Pusher v. American Ry. Exp. Co.,* 149 Minn. 308.

"In the instant case the evidence indicates partial dependency upon the assistance of the son, and partial dependency is sufficient to support an award of the percentage of the wages of the deceased specified in the statute: *Harris v. Hoage,* App. D.C. 66 F. (2d) 801; *Texas Employers' Ins. Assn. v. Sheppeard,* 5 Cir. 62 F. (2d) 122; *Pocahontas Fuel Co., Inc. v. Monahan,* 1 Cir. 41 F. (2d) 48." (Emphasis supplied.)

In *Pocahontas Fuel Co. v. Monahan, deputy commissioner, supra,* in the first circuit, the court said:

"We do not regard the fact that the father was possibly earning sufficient money to support himself alone as the test of his dependency."

Following are cases in which awards were made under the New York compensation law from which the Longshoremen's Act was largely adopted, for fatal injuries to sons who had lived in their parents' homes, as reported in the New York State Industrial Commission Special Bulletin No. 161, on page 146:

"A rigger hurt by a fall; award to mother; lived with her and her husband whom she had married within the year; had supported her before the marriage; after it, gave her $9 a week regularly and other money, presents and supplies now and then; *Blauvelt v. Thurber,* 221 App. Div. 826."

"A steamfitter's helper killed by a fall; award to mother; lived with her and her husband, his stepfather, who was sickly; gave her $25 or $30 a week; she herself earned living premises and $10 a month as a caretaker; *Donnelly v. Kingsley & Co.,* 221 App. Div. 823."

"A nineteen year old solderer fatally injured while using an air jack; award of accrued disability compensation and death benefits to his mother; lived with parents and four other children; paid $7 of his $18 weekly earnings into the family pot; his father earned $37 a week: *Hebert v. Prest Air Devices,* 224 App. Div. 799."

"A carpenter killed by an elevator; award to his seventy-two year old grandmother; mother insane; grandmother had taken her place and reared him with his four brothers and sisters; he had contributed $15 a week to the family pot: *Janececk v. Bonded Floors Co.,* 223 App. Div. 805."

"A twenty-two year old lineman electrocuted by a live wire; award to father and mother; lived with them on fifty-three acre farm; father's age was sixty-four; son gave mother $5 a week, also gave father money to buy feed and pay taxes: *Jansen v. Harlem Valley Electric Corp.,* 222 App. Div. 786."

"A pumpman killed by falling roof rock; award to mother; lived with parents, two brothers and

a sister; father had been unwell; earned more than father; gave mother $15 a week and bought things for the home: *Linderman v. Beaver Products Co.,* 222 App. Div. 844."

"An eighteen year old laborer killed by a fall; award to father; lived on ten acre farm with father; mother and sixteen year old sister; mother and sister did not file claims; son had promised to help pay for and stock the farm; had worked for his employer but ten days; *Rifenbark v. Mohawk Limestone Products Co.,* 224 App. Div. 803."

"Boilermaker's helper, twenty-one years old, killed by collapse of a scaffold; award to mother; lived with father, mother, three brothers and a sister; home mortgaged; father earned $24 a week; deceased $23, of which $13 went to the family: *Sidoti v. Dutchess Bleachery,* 222 App. Div. 705."

In Paragraph X of the complaint it is alleged in substance that inasmuch as the deceased did not contribute to his parents' support during the five months prior to his death they were not dependent upon the deceased for support. The father testified that he received $50 from the son sometime in either February or March, which could conceivably have been within three months of the death (T. 38).

But assuming *arguendo* that the deceased had not contributed during the five months' period as alleged in the complaint, this would not mean that his parents were not dependent upon him at the time of his death; he intended to help them whenever it became

necessary while he was away in California as evidenced by the letter he wrote his brother wherein he asked his brother to watch out for their parents and let him know what, if anything, they needed, and if it became necessary he would come home. This indicated an intention to continue to attend their needs when the occasion might arise and that he was cognizant of their dependency upon him. The temporary suspension or reduction in whole or in part of the contribution from the deceased to his parents during the period in which he went to California in search of work did not change the status from dependency to non-dependency. The *dependency continued* even though the parents' immediate needs had been temporarily taken care of by the advanced contributions made by the deceased before leaving for California and by the authority given to the mother to check against the deceased's bank account. The courts have uniformly held that the dependency once shown to exist is presumed to continue even though there has been a temporary cessation of contributions during the period immediately preceding the death. A review of the cases to which we are about to refer will show this to be the prevailing view.

Dependency is a condition wherein the dependent person looks to another source than his own means for his support. *Utah Fuel Co. v. Industrial Comm.*, 15 Pac. (2d) 297, 80 Utah 301; *Ash v. Modern Sand & Gravel Co.*, 122 S.W. (2d) 45, 234 Mo. App. 1195. In order to determine whether that condition or status *existed at the time of injury* and whether claimant

actually did, or might reasonably be expected to, look to deceased for support, it is necessary to consider evidence leading up to and prior to the date of injury. In other words, while the status or condition has to be determined as of the time of injury, the evidence upon which the determination of that status or condition is to be made obviously cannot be confined to the date of injury.

The evidence usually presented to show dependency relates to contributions made by deceased to the claimant. If the evidence shows that deceased for some time prior to the injury contributed to the support of the claimant, who had no other means of support or whose means of support were insufficient, the proof would establish dependency. As indicated above, proof of contributions is evidence usually presented, but the condition of dependency could exist although there is no evidence that at the time of injury the deceased was actually making contributions to the dependent. For example, a parent may be dependent upon a child and the latter, although he recognized the dependency in the past, may have been temporarily unable, by reason of illness, unemployment or other circumstances, to make contributions just prior to the injury. *Empire Zinc Co. v. Industrial Comm.,* 77 Pac. (2d) 130, 102 Col. 26; *LaSalle County Carbon Coal Co. v. Industrial Comm.,* 356 Ill. 421, 190 N. E. 687 (1934); *Shaffer v. Williams Bros.,* 44 S.W. (2d) 185, 226 Mo. 635 (1931); *Illinois Steel Co. v. Industrial Comm.,* 139 N.E. 921, 308 Ill. 466 (1923). In the *LaSalle* case, *supra,* the deceased employee had for sev-

eral years paid $25.00 per month regularly to his older brother and sister-in-law for the support of his aged father who had been unable to work for six years. For two months he failed to pay the $25.00 per month for his father's keep when it became due, but shortly before he was killed he told his father that when he got his first pay he would pay all arrears due. The court said:

> "The record discloses ample competent evidence to establish the dependency of plaintiff upon his deceased son when the latter met his accidental death. The evidence shows conclusively that the two months' break in monthly payments for plaintiff's board did not disestablish the relation of dependency which all the parties had recognized for years. * * * This testimony, in effect, established that the failure of Louis to pay for his father's support was temporary only, necessitated by his present lack of money. It was proper, though not essential, to show the cause for the lapsed payments by the only persons who knew about it, even though other competent evidence clearly showed a continuing and long established dependency. On questions of dependency, the workmen's compensation act should receive a practical and liberal construction. Dependency, once recognized and firmly established by regular contributions for support over a reasonable course of time, is not abruptly terminated by a temporary failure of the contributor to meet his obligations of support as they become due, in the absence of proof that the relationship has definitely ceased to exist by the action of one or both of the parties."

In the case of *Williams v. John B. Kelly Co.,* 193 Atl. 79 (Pa. Sup. 1937), a mother sought compensation for the death of her son. It appeared that he had helped to support his mother in the past but that owing to his unemployment, the contributions had temporarily ceased; he secured employment again, but was killed shortly after his first pay from which he had sent her nothing owing to the necessity of buying shoes and clothing; he had, however, expressed an intention of sending her money from his new employment. The court said:

> "The fact finding authorities were warranted in finding that claimant was practically dependent upon her deceased son. The fact that no contributions were made from the one pay the son received is fully explained by the boardinghouse keeper—that they were used by him to buy needed shoes and clothing. Such temporary cessation of contributions did not establish that the dependency, which previously existed, had ceased. The testimony would have warranted a finding that the mother was actually in need of support, as she was unemployed and had been subsisting upon the contributions made by the son and the married daughter. Under such proof, where contributions were in fact made by the son, his legal obligation to maintain and support his mother qualified her as a dependent."

As illustrating the point that contributions are not the *sine qua non* in proof of dependency, in the case of *Balthazar v. Swift & Co.,* 120 So. 896, 10 La. App. 25, a parent in destitute circumstances at the time of

death of her son, was held "actually dependent" upon him, under the workmen's compensation law, in view of the legal duty of a child to maintain his parent in need, as provided by the State law, although the deceased child in this case had never in fact contributed anything to the support of his parent, prior to injury. In another case, under the Federal statute, authorizing recovery for death of an interstate railroad employee, it was stated that "dependency" may be founded upon a merely moral obligation resting upon the deceased to render such aid, since a "dependent" is one who is sustained by another or relies for support upon the aid of another, to whom he looks for reasonable necessaries consistent with dependent's position in life. (*Saderstrom v. Missouri Pacific R. Co.,* Mo. App., 141 S.W. (2d) 73, 79.)

In another case, arising in Georgia, where under the law dependency must have actually existed at the time of the accident *and three months prior thereto,* it was recognized that physical contributions of *cash or supplies are only evidential of such dependency,* and the fact that they were temporarily interrupted by unemployment, or some cause independent of the will or desire of the employee, and were not made continuously for the three-month period immediately preceding injury as the statute requires, will not necessarily negative dependency, where other evidence showed such dependency. (*Maryland Casualty Co. v. Campbell,* 129 S.E. 447, 34 Ga. 311 (1925).)

The *need* of the dependent having been established, dependency upon the employee can be shown in other ways, one of which would be by acknowledgment on the part of the employee of his intention, will or desire to aid the dependent, in recognition either of his moral or legal obligation to do so, which may derive support from evidence of his past performance in this respect. The facts in each case are largely controlling, and even though the dependent may have several children, in some cases the dependent may show that a particular child was the one looked to or relied upon for aid, and with respect to whom there may reasonably be expectation of such aid, even though fortuitous circumstances may have temporarily prevented actual contributions.

In confining the parents to proof of contributions made by the deceased within one year before his death, the deputy commissioner restricted them beyond the requirement of the statute. There is no provision in the Act that contributions made more than one year prior to the death may not be offered as proof that dependency existed "at the time of injury." There is such a requirement in the Longshoremen's Act (sec. 2 (14) 33 U.S.C.A. sec. 902 (14)) as to the proof in the case of a child to whom the deceased employee is claimed to have stood in *loco parentis;* said relationship must have existed for at least one year prior to the time of injury. As stated above there is no provision limiting the proof of dependency. However, as a practical matter of administration there must be

some time limit placed upon the proof which is offered to establish dependency; the deputy commissioner's action in the instant case of accepting proof of contributions only if made within the year prior to the injury is within administrative discretion and not unreasonable. At any rate it was a restriction placed upon claimants and not upon the employer and carrier who were not harmed by the ruling. If however appellants contend that the deputy commissioner should have confined the proof of contributions to "the time of the injury", meaning that *dependency at the time of the injury* may not be proven by *contributions made before the injury,* they are urging an unreasonable and impracticable construction, which if applied without qualification (appellants do not qualify) would confine the right to compensation to dependent parents only if the deceased employee made a contribution to them at the time of injury, presumably the day of injury. If, as it appears, such construction is unreasonable then it follows that dependency at the time of injury should be provable by contributions made prior to the injury, the only question then remaining being whether and to what extent a time limit should be placed upon the proof of contributions. The deputy commissioner in the instant case restricted the proof to one year. It is not necessary to the issues in the instant case to decide whether or not such a limitation was proper.

It is respectfully submitted that the evidence clearly shows the partial dependency of the parents at the

time of their son's death of a degree well within the degree of dependency shown in the cited decisions and is sufficient to support the finding of dependency at that time.

Appellants raise one other issue, namely that the dependency if any which existed at the date of injury has terminated since "to the date of the hearing on October 21, 1947, said Henry Maneke and Mollie Maneke have not been dependent for support upon any source outside of their own income".

This allegation has no support in the record; there is no evidence in the record that the parents' financial condition or status has improved since the death of their son or that it has improved to the extent that they have become economically independent. *Ottenstein v. Britton, deputy commissioner,* 160 F. (2d) 253 (C.A. D.C. 1947). If appellants have evidence that the dependency has ceased, they may apply to the deputy commissioner for termination of the award under section 22 of the Act (33 U.S.C.A. sec. 922).

CONCLUSION.

It is respectfully submitted that the finding of the deputy commissioner in the compensation order complained of has "substantial roots in the evidence and is not forbidden by the law"; hence the judgment of the court below sustaining the compensation order was proper and should be affirmed. *Cardillo, deputy*

commissioner v. Liberty Mutual Insurance Company, 330 U.S. 469.

Dated, March 16, 1949.

Respectfully subimitted,

FRANK J. HENNESSY,
United States Attorney,

DANIEL C. DEASY,
Assistant United States Attorney,

Attorneys for Appellee Pillsbury.

WARD E. BOOTE,
Chief Counsel,

HERBERT P. MILLER,
Assistant Chief Counsel,
Bureau of Employees' Compensation,
Federal Security Agency,

Of Counsel.